In the Court of Queen's Bench.

CUCKSON *vs.* STONE.

By an agreement between the plaintiff and defendant, the former agreed to serve the latter for the term of ten years as a servant (a brewer,) and that he would during that time well, truly and faithfully serve him; and the defendant agreed that during the said term he would pay the plaintiff the weekly sum of 2*l.* 10*s.* During the service under the agreement, the defendant had an attack of rheumatic gout, which required him to remove to a distance for change of air. He was absent thirteen weeks, after which he returned to his service. The defendant having refused to pay him the weekly sum of 2*l.* 10*s.* during these thirteen weeks, the plaintiff brought the present action: Held, that the plaintiff was entitled to recover.

This cause was tried at the last assizes for Derby, when a verdict was returned for the plaintiff, with 32*l.* 10*s.* damages.

The declaration stated that, by a memorandum of agreement, dated the 30th December, 1848, between the plaintiff of the one part, and one Watts, since deceased, and the defendant of the other part, it was agreed that the plaintiff, in consideration of 20*l.* paid by them to the plaintiff on the execution of the agreement, and also in consideration of the weekly and other payments thereby agreed to be paid by them to the plaintiff as thereinafter mentioned, the plaintiff did thereby agree with them, and the survivor of them, that he should well and truly and faithfully serve them for and during the full period of ten years as and in the capacity of a brewer; and should during the same period observe all their lawful commands, &c., while so serving them as brewer aforesaid, and in all things remain, continue, and be a good, faithful and obedient servant; and Watts and the defendant, in consideration of the premises, and also in consideration of the due, full, and complete service of the plaintiff as aforesaid, &c., did, and each of them did thereby, for himself and themselves, promise and agree with the plaintiff that they should pay him 20*l.* on the execution of the agreement, and should find and provide the plaintiff with a dwelling house for his own occupation, and also coals during the whole of the term of ten years, and should pay unto the plaintiff the weekly sum of 2*l.* 10*s.* during the term of

ten years. And although all things have happened and been performed in order to entitle the plaintiff to the performance of the promise of the defendant, yet the defendant, after the death of Watts, refused to suffer or permit the plaintiff to continue in the defendant's service under the agreement, and to earn his weekly wages, and refused to pay the plaintiff the sum of 2*l.* 10*s.* a week for thirteen weeks.

The fourth plea, which was pleaded to so much of the declaration as related to the claim for wages, stated that the plaintiff was not, during any part of the time in respect of which such wages were claimed, ready, willing, or able to render, and did not, in fact, during any part of such time, render the agreed or any service in manner and form as alleged.

Issue was joined upon this plea, and it was likewise demurred to. It was proved at the trial that the plaintiff had under this agreement served the defendant until Christmas 1857, when he had an attack of rheumatic gout, which caused him to be unable to perform his services. He received, however, his weekly wages until the following March, when he went to Brixton for change of air, and was absent thirteen weeks, during which he received no wages, and for which period the present action was brought. Afterwards he returned and resumed his services.

Hayes, Serjt., having obtained a rule on the part of the defendant to set aside the verdict, and it being arranged that the rule and the demurrer should be argued together,

Mellor, Q. C. and *Mundell* showed cause.

Hayes, Serjt. contra.

The following cases were cited:—*R.* vs. *Madington*, Burr. S. C. 675; *R.* vs. *Wentersett*, Cald. 298; *Wallis* vs. *Warren*, 4 Ex. 361; *Beale* vs. *Thompson*, 4 East, 546; *Melville* vs. *De Wolf*, 4 E. & B. 847; *Stavers* vs. *Curling*, 3 Bing. N. C. 355; *Chandler* vs. *Grieves*, 2 H. Bl. 606; *De Medina* vs. *Norman*, 9 M. & W. 820; *Aspden* vs. *Austin*, 5 Q. B. 671; *Harmer* vs. *Cornelius*, 32 L. T. Rep. 26.

Cur. adv. vult.

Lord CAMPBELL, C. J.—We are of opinion that this plea is good, being pleaded only to the claim for wages, and it appeared that the

plaintiff was not, during any part of the time in respect of which such wages are claimed, ready and willing or able to render, and did not in fact render, the agreed or any services. We think the gist of this plea is, that the plaintiff during the time in question was not ready and willing to render, and did not render any services, and voluntarily and willfully refused. If so, we think he could not claim for wages in consideration of his services. It was suggested that the breach of contract could only be the subject of a cross-action; but the alleged breach of contract on his part seems to go to the whole consideration for the wages. We must treat the demurrer as if the action were brought for the wages only, and to avoid circuity of action it may well be considered that this action should be barred, so as to prevent an unjust advantage in this action, and to put an end to further litigation, rather than that the plaintiff should be allowed to recover wages when he had refused to serve, and that another action should be brought against him to recover them back. Therefore, upon the demurrer to the fourth plea, we give judgment for the defendant. Then as to the rule for entering the verdict on the fourth count: the verdict was given for the plaintiff on the fourth count, and this was a rule to set the verdict aside, and to enter it on that count for the defendant. Whether, when issue is joined on such a plea, a want of ability to do an act proves, in point of law, a want of readiness and willingness, depends on whether this want of ability is necessarily a breach of the contract to perform a condition precedent, or the consideration for the promise sued on. In an action for not adopting goods purchased, issue being joined on a plea that the plaintiff was not ready and willing to deliver them, the defendant would be entitled to the verdict, on proof that the plaintiff never was in possession of the goods he undertook to deliver. But looking at the nature of the contract sued on in the action, we think that want of ability to serve for a week would not of necessity be an answer to a claim for a week's wages. In truth, the plaintiff was ready and willing to serve, or had been able to do so, and was only prevented serving during the week by the visitation of God, the contract to serve never having been determined. That leads to the consideration of the following question, which was reserved at

the trial—whether, under the circumstances, the plaintiff was entitled to recover? The agreement is of a very peculiar nature: that the plaintiff should serve the defendants in the capacity of a brewer, and teach them to brew; that they were to pay the plaintiff 20*l.* on the execution of the agreement; to find him a house; to supply him with coals for ten years, and to pay him the weekly sum of 2*l.* 10*s.* during the said term. We concur in the observations of my brother Willes in *Harmer* vs. *Cornelius*, that if the plaintiff, from unskillfulness, had been wholly incompetent to brew, or by the visitation of God had become, from paralysis or any other bodily illness, permanently incompetent to act in the capacity of a brewer to the defendants, we think the defendants might have determined the contract. He could not be considered incompetent by illness of a temporary nature; but if he had been struck with disease, so that he could not have been expected to return to his work, we think the defendants might have dismissed him and employ another brewer in his stead. Instead of being dismissed he returned to service; and the defendants, when he had been restored to them, employed him and paid him as before. At the trial the defendant's counsel admitted that the contract was not rescinded. The contract being in force, we think that there was no suspension of the weekly payment by reason of the plaintiff's illness, or inability to work. It is allowed that, under this contract, there could be no deduction from the weekly sum in respect of his being disabled by illness from brewing one day, or week; and while the contract remained in force, we see no difference between his being disabled for a day, or a week, or a month. Upon the whole, therefore, we think that the verdict obtained by the plaintiff ought not to be disturbed, and that the rule granted for that purpose ought to be discharged.

Rule discharged—Judgment for the defendant on the demurrer.